IN THE

SUPREME COURT OF THE UNITED STATES

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NO. 72-289

KENT B. DIEHL, SR.,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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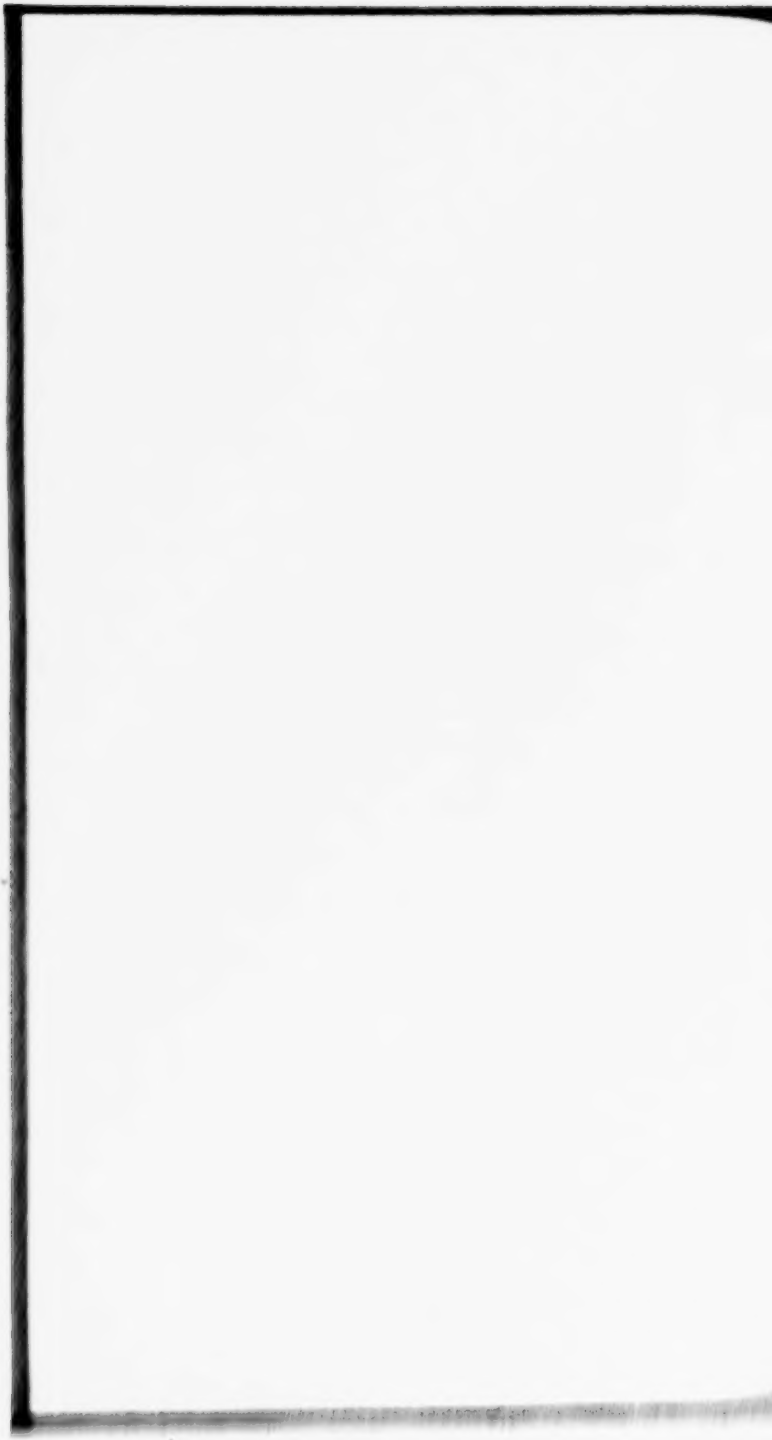

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Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on March 20, 1972.

CITATIONS TO OPINIONS BELOW:

The opinion of the District Court, printed in Appendix A of the separate bound Appendice, apparently is unreported. The opinion of the United States Court of Appeals for the Fifth Circuit is printed in Appendix B of the separate bound Appendice and is reported at 457 F. 2d 511. The decision of the Fifth Circuit is an affirmance without an opinion.

JURISDICTION

1. The Judgment of the Circuit Court of Appeals was dated March 20, 1972, and it was entered on the same day.
2. The Order overruling the Motion for Rehearing was dated May 31, 1972.
3. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1346.

QUESTIONS PRESENTED

1. Whether the claim for refund for the calendar year 1957, which was filed by and signed by Kent B. Diehl, Sr., was filed for the benefit of Beth Koehler Diehl.

STATUTES INVOLVED

The Statute involved is 28 U.S.C.,Section 7422. This section of the Internal Revenue Code of 1954 is printed in Appendix C of the separate bound appendice.

STATEMENT

This is a civil action for the recovery of federal income taxes for the calendar year 1957.

Kent B. Diehl, Sr., hereinafter called Mr. Diehl, and his wife, Beth Koehler Diehl, hereinafter called Mrs. Diehl, filed their joint 1957 income tax return with the District Director of Internal Revenue, Austin, Texas. The income reported in that return represented their community income. The income tax liability on that return was $5,546.21 which income tax liability was paid from the community funds of Mr. and Mrs. Diehl. Thereafter Mr. Diehl filed a claim for refund for $5,546.21 for the calendar year 1957. On September 27, 1962, he filed his complaint in the Trial Court based on his claim for refund. The Government filed a timely answer.

On December 17, 1962, the parties filed a joint motion for an order to stay proceedings requesting that the Trial Court stay all proceedings until disposition of the criminal proceedings then pending against Mr. Diehl for alleged criminal tax violation and which cause was pending in the Trial Court. An order to that effect was entered.

On September 22, 1966, Mr. Diehl died and thereafter the criminal proceedings against him were dismissed.

On December 8, 1966, Mrs. Diehl, who at all times pertinent was a resident of Houston, Harris County, Texas, filed her motion for intervention alleging that she and Mr. Diehl filed a 1957 joint federal income tax return and paid the sum of $5,546.21 in tax with respect to that return which amount represented community property of herself and Mr. Diehl. She further alleged that she was entitled to a portion of any income tax refund that may be

recovered in that action and that she was an indispensable party to that action. Later the Trial Court entered an order granting her motion and permitting her individually to intervene as one of the Plaintiffs in this cause. Thereafter she filed her pleading wherein she adopted any and all of the pleadings which were previously filed in this cause by Mr. Diehl as if she had been a Plaintiff when the original complaint was filed.

Later Mrs. Diehl filed a motion that she as Independent Executrix of the Estate of Kent B. Diehl, Sr., Deceased, be substituted as one of the Plaintiffs in place of Mr. Diehl. That motion was first granted but later the Trial Court entered an order that she was not the Independent Executrix of the Estate of Kent B. Diehl, Sr., and dismissed her in her representative capacity.

Later Donald G. Ritter filed a motion that he be permitted to be substituted in place of Mr. Diehl as the Temporary Administrator of the Estate of Kent B. Diehl, Sr. That motion was approved by the Trial Court but later the Trial Court entered an order dismissing the cause of action of both Mr. and Mrs. Diehl as well as the counterclaim which the Government had filed in this cause.

On appeal to the United States Court of Appeals for the Fifth Circuit, Kent B. Diehl, Sr., et al, vs. United States of America, 438 F. 2d 705, (1971), certiorari denied, 92 S. Ct. 67, the Fifth Circuit held that the action of the Trial Court in dismissing Mrs. Diehl in her representative capacity and Ritter in his representative capacity was proper. However, on page 711 of that opinion, the Fifth Circuit held that the record was not clear as to whether Mrs. Diehl had filed a claim for refund because if she

had then she would be entitled to maintain suit in her individual capacity for a refund of one-half (1/2) of any income taxes paid. The Fifth Circuit gave Mrs. Diehl thirty (30) days from the receipt of the mandate in the Trial Court to move for the reinstatement of the intervention in her personal behalf if such a claim was in fact filed.

Within the thirty (30) day period Mrs. Diehl filed her motion in the Trial Court for an order that the claim for refund filed by Kent B. Diehl, Sr., was filed for her benefit. In her motion, Mrs. Diehl stated that even though there was only one claim filed in this matter, which claim was signed by Mr. Diehl, that since the claim for refund was for all of the income taxes which had been paid with that return which represented community funds of the parties that the claim for refund was filed by Mr. Diehl for the benefit of both Mr. and Mrs. Diehl.

Even though at the time that the claim for refund was filed Mr. and Mrs. Diehl were divorced, the marriage of Mr. and Mrs. Diehl in Texas was no more than a partnership and Mr. Diehl had authority to act for Mrs. Diehl in winding up the affairs for their former partnership. At the time that Mr. and Mrs. Diehl were divorced in 1959, the claim for refund for the year 1957 was not covered by them in any property settlement.

On May 11, 1971, the Trial Court entered its memorandum opinion and order dismissing the personal intervention of Mrs. Diehl in her individual capacity, Appendix A of the separate bound appendice.

ARGUMENT

1.

THE CLAIM FOR REFUND FOR THE CALENDAR YEAR 1957 WHICH WAS FILED BY AND SIGNED BY KENT B. DIEHL, SR., WAS FILED FOR THE BENEFIT OF BETH KOEHLER DIEHL.

Mrs. Diehl's position is that even though the claim for refund involved in this case was signed only by Mr. Diehl that it was filed for both her and Mr. Diehl's benefit, since their marriage was a partnership under the laws of the State of Texas, that after their divorce in 1959 that either party, Mr. or Mrs. Diehl, had the right to wind up the affairs of that partnership and that would include filing a claim for refund for overpayment of income taxes.

A marriage in Texas is no more than a partnership. In Commissioner vs. The Chase Manhatten Bank, 259 F. 2d 231, 2 AFTR 2d 6363, (5th Cir., 1958), the Court said on page 6368:

"A few basic principles characterize the community property system. Their application here is determinative of the issues in this case.

"The community property system comes from the custom of the women of the Visigoths and other Germanic tribes sharing the fighting and spoils of war with their men; it owes its strength to the civilized view that marriage is a full partnership. Husband and wife are equal partners. Each has a present, vested half interest in all community property. All property accumulated during marriage is community property, unless it is received by gift, devise or inheritance. In Texas even income derived from separate property belongs to the community including interest and dividends from separately owned securities. The husband is the manager of the community. But this management is not equivalent to ownership. He acts as a managing agent or trustee or managing partner of a limited partnership. The husband may sell or donate community property but not in fraud of his wife's rights. The earnings of the husband during marriage are community, and property purchased with such earnings is also community. The wife's rights aside from managerial control, are the same as the husband's. Thus, on death or divorce the community is divided equally. . . ."

The determination of property rights is a question to be decided on under State law.

In Owens vs. Drywall and Accoustical Supply Corp., 27 AFTR 2d 71-1085, (United States District Court, Southern District of Texas, 1971), the Court said on page 1091:

> "The determination of property rights is a question to be decided under state law, Aquilino v. U.S., 363 U.S. 509 [5 AFTR 2d 1698] (1960). . . ."

In Aquilino vs. U.S., 363 U.S. 509, 80 S. Ct. 1277, 5 AFTR 2d 1698, (1960), this Court said on page 1699:

> "The threshold question in this case, as in all cases where the Federal government asserts its tax lien, is whether and to what extent the taxpayer had 'property' or 'rights to property' to which the tax lien could attach. In answering that question, both Federal and State courts must look to state law, for it has long been the rule that 'in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute.' Morgan v. Commissioner, 309 U.S. 78, 82, [23 AFTR 1046]."

See also United States vs. Durham Lumber Co., 363 U.S. 522, 5 AFTR 2d 1703, (1960), to the same effect.

In connection with whether a consent extending the statute of limitations is applicable against a taxpayer corporation which has been dissolved, the Courts look to the State law to see if those signing the consents had authority to sign. In Kemp, et al, vs. United States, 42 F. 2d 7, 5 AFTR 5926, (5th Cir., 1926), the question was whether a consent extending the statute of limitation for the year 1917 was valid which had been executed by the former president and secretary of the taxpayer corporation which was dissolved at the time that the consent was executed. The Court looked to the Texas law which in general provided that for a period of three years after the dissolution of the corporation that the president and directors of the dissolved corporation were trustees of the creditors and the stockholders of the corporation with full power to settle its affairs. See Ann C. Fields, et al, vs.

Commissioner of Internal Revenue, 32 T.C. 187; and Bothwell, et al, vs. United States, 18 Fed. Supp. 1011, 19 AFTR 650, (United States Court of Claims, 1937), to the same effect.

In Texas, on the dissolution of a partnership, either partner has the right to settle outstanding accounts and to do anything else necessary for the winding up of the partnership affairs. In Jones vs. Mitchell, (Court of Civil Appeals of Texas, 1932), 47 S.W. 2d 371, error refused, the Court said on page 373:

> ". . . On the dissolution of the partnership existing between appellant and appellee, either party could settle outstanding accounts, compromise outstanding debts due to the partnership, complete the performance of contracts previously entered into, and reduce the assets to cash or its equivalent, without any specific agreement in respect thereto, and the one so acting continues to be the agent of the other for the accomplishment of such purposes. The liquidating partner cannot bind another partner on a new contract, nor execute notes of the partnership for

the renewal of a pre-existing firm debt without the consent of the other member or members of the firm. White v. Tudor, 24 Tex. 639, 76 Am. Dec. 126; Page on Contracts, Vol. 3, Sec. 1716, 47 C.J. 1124, Sec. 794; 20 R.C.L. 198, p. 968. In short, after a dissolution of a partnership, none of the partners can do any act or make any disposition of the partnership property or funds in any manner inconsistent with the primary duty, then resting upon all of them, of winding up the partnership."

In Howell vs. Bowden, (Court of Civil Appeals of Texas, 1963), 368 S.W. 2d 842, error refused, N.R.E., the Court said on page 847:

". . . Dissolution does not terminate a partnership.[2] The relationship continues during the winding up period. This is especially true when one of the parties is still in charge of the business. He occupies a fiduciary relationship to the other partner until the winding up of the partnership affairs is complete.

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[2] It is interesting to note that the Texas Uniform Partnership Act which went into effect in 1962, too late to control this case, so provides. See Art. 6132b, Sec. 30, Vernon's Annotated Civil Statutes.

"Rowley on Partnership, Sec. 582 (1960 Ed.) says there are three steps in the termination of a partnership: (1) dissolution, (2) winding up, and (3) termination and accounting. See also Jones v. Mitchell, Tex. Civ. App., 47 S.W. 2d 371; 40 Am. Jur. 388, 393; 80 A.L.R. 15; 55 A.L.R. 2d 1424."

In Keller vs. Keller, 141 S.W. 2d 308, (Commission of Appeals of Texas, 1940), opinion adopted by the Texas Supreme Court, held that in connection with a divorce that the former wife would be entitled to 1/2 of the proceeds of salaries and a loan which were collected by the husband after the divorce and on which no property settlement had been made. See also Baber vs. Galbraith, (Court of Civil Appeals of Texas, 1916), 186 S.W. 345, error refused, to the same effect.

The Texas law is that on the death of a partner that the surviving partners have the duty of winding up the partnership affairs. Martin, et al, vs. Dial, et al, 57 S.W. 2d 75, (Commission of Appeals of Texas, 1963);

Amarillo National Bank vs. Harrell, 159 S.W. 858, (Court of Civil Appeals of Texas, 1913), error refused; Iowa Manufacturing Co. vs. Baldwin, (Court of Civil Appeals of Texas, 1935), 82 S.W. 2d 994; Gay vs. Jackman, 254 S.W. 927, (Commission of Appeals of Texas, 1923); and Shivel and Stewart vs. Greer Bros., (Court of Civil Appeals of Texas, 1909), 123 S.W. 207.

At the time Mr. Diehl filed the claim for refund he was doing so as one of the partners of his and Mrs. Diehl's former partnership (marriage) and the claim for refund is for the benefit of both Mr. Diehl and Mrs. Diehl. Since one-half of the income taxes which were paid for the year 1957 are presumed to have been paid by Mrs. Diehl, then Mrs. Diehl is entitled to maintain her suit for the refund claimed to the extent of one-half of the amount of the overpayment of income taxes for the calendar year 1957.

CONCLUSION

For the foregoing reasons, Petitioner asks this Court to reverse the decision of the United States Court of Appeals and hold that the claim for refund filed on behalf of Mr. Diehl was filed for the benefit of Mrs. Diehl and that Mrs. Diehl should not have been dismissed by the Trial Court in her individual capacity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dougal C. Pope, the attorney for Petitioner, hereby certify that on the 15th day of August, 1972, I served copies of the foregoing Petition for Writ of Certiorari and the separately bound Appendice on the several parties thereto as follows:

1. On the United States by mailing a copy in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D. C. 20530, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to the Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D. C. 20530.

Dougal C. Pope